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BY ELECTRONIC COMMENT FILING SYSTEM

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Developing an Unified Intercarrier Compensation Regime et al.* – WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 07-135; WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45; WC Docket No. 03-109; WT Docket No. 10-208

Dear Ms. Dortch:

On December 20, 2011, Carl W. Northrop and Michael Lazarus of Telecommunications Law Professionals PLLC ("TLP"), along with Mark A. Stachiw, Vice Chairman, General Counsel & Secretary of MetroPCS Communications, Inc. ("MetroPCS") (by teleconference), met with Commission staff members Zachary Katz, Peter Trachtenberg, Victoria Goldberg, Michael Steffen, and Rebekah Goodheart in connection with the above-referenced proceedings. The purpose of the meeting was to discuss the requests of certain local exchange carriers ("LECs")[1] with high wireless reciprocal compensation rates (the "High Priced LECs") for the Commission to reconsider its decision to establish an effective date of December 29, 2011 for the default bill-and-keep reciprocal compensation regime for intraMTA traffic exchanged between commercial mobile radio service ("CMRS") carriers and all LECs. As is set forth in greater detail below, the Commission should not postpone the December 29, 2011 effective date for bill-

[1] Letter from Karen Brinkman, counsel to CenturyLink, FairPoint, Frontier and Windstream, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-92, *et al.* (filed Dec. 14, 2011) ("Price Cap LEC Letter"); as supplemented December 20, 2011, Letter from CenturyLink, Frontier Communications Corp., FairPoint Communications, Inc., and Windstream Communications, Inc. to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, *et al* (filed Dec. 20, 2011) ("Second Price Cap Letter"); Letter from Michael Romano, NTCA, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-92, *et al*, (filed Dec. 14, 2011); Letter from Thomas Jones, counsel to Integra Telecom, Inc. and tw telecom inc., to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-92, *et al.* (filed Dec. 19, 2011) ("CLEC Letter") (collectively, the "LEC Letters").

and-keep arrangements to apply to the exchange of intraMTA CMRS-LEC traffic. If the Commission nonetheless modifies the effective date of this particular aspect of intercarrier compensation reform, it must carefully limit the scope of any relief solely to the specific issues raised in order to reduce the prospect of undermining the thoughtful equilibrium in the recent *Order*.[2]

The Commission Should Leave Unchanged its Well Reasoned Requirement that Non-Access LEC-CMRS Traffic be Exchanged on a Bill-and-Keep Basis as of December 29, 2011

MetroPCS previously has congratulated this Commission for crossing the finish line on the first leg of what already has been a decade-long marathon to comprehensively reform both the intercarrier compensation system and the universal service fund. The recent *Order* involved significant tradeoffs for all affected carriers, and reflected a careful, well reasoned balancing of all interests after extensive deliberation. The extraordinary *sua sponte* relief being sought by the High Priced LECs threatens to compromise the entire Commission effort. Hastily changing one aspect of the *Order* – especially if the Commission rushes to judgment based on an incomplete record and without following the established reconsideration procedures – will undermine the Commission's credibility, reduce the prospect of sustaining the *Order* on appeal, and could open the proverbial floodgates for additional requests from all parties who did not prevail on each and every issue related to them in the *Order*.[3]

It is of particular concern to MetroPCS that the relief sought by the High Priced LECs will undermine the significant and long overdue strides the Commission has taken to curb traffic pumping in the local reciprocal compensation market. The Commission's action with respect to intraMTA LEC-CMRS traffic was a key component of the *Order*, was the only solution adopted by the Commission to address this problem,[4] and represented a reasoned determination based on the well-developed facts in the record. The High Priced LECs fail to sustain their claim that the Commission's adoption of an immediate transition to a bill-and-keep regime for the exchange of intraMTA CMRS-LEC traffic was based on

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[2] *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (the "*Order*").

[3] The Order obviously represents a number of compromises on positions advanced by all parties to the proceeding. Modifying one will inevitably lead others to conclude that the Commission should likewise modify certain rules for them as well. For example, certain members of the wireless industry have expressed concerns about the size of the Mobility Fund, as well as and the right of first refusal granted to certain LECs. *See* Press Release, Rural Cellular Association, Details in USF Order Show Inadequate Wireless Funding (Nov. 21, 2011) (available at http://rca-usa.org/press/rca-press-releases/details-in-usf-order-show-inadequate-wireless-funding/916787).

[4] For example, the Commission's traffic stimulation rules for interstate access traffic do not apply to intra-MTA CMRS-LEC traffic.

miscalculations, and as a result, the effective date for such a transition should not be extended. Indeed, as MetroPCS indicated during the above-referenced meeting, the amount of traffic terminated by the High Priced LECs to MetroPCS is relatively small, and represents a small fraction of the total traffic MetroPCS exchanges with other LECs. Indeed, based on MetroPCS' data, it appears that the High Priced LECs represent less than 5% of all intraMTA traffic that MetroPCS terminates to other LECs.[5] As a result, the Commission should be particularly reluctant to modify one key aspect of its carefully crafted solution for a small subset of the total intraMTA traffic exchanged between CMRS carriers and LECs.[6] The Commission's *Order* represents a comprehensive solution, and a change of one aspect of the rules will have far-reaching effects on additional parties, and shift the delicate balance in the *Order*. Most important, the High Priced LECs have failed to counter the record evidence that led the Commission to adopt an immediate transition for the exchange of such traffic.

Immediate action on the High Priced LECs' request would be objectionable on both procedural and substantive grounds. Procedurally, any action would fly in the face of the Administrative Procedure Act,[7] due process, and Commission past practice and procedure. The 759-page *Order* represents the views of thousands of commenters over ten years of deliberations regarding the proper rules for intercarrier compensation reform. The extended proceeding provided innumerable opportunities for comment in order to inform the Commission's decision. Notably, bill-and-keep has been under serious consideration as the unified basis for comprehensive intercarrier compensation reform at least since the publication of the DeGraba Report in 2002,[8] and CMRS carriers consistently have advocated for the immediate imposition of a default bill-and-keep regime for LEC-CMRS interconnection.[9] Thus, the High Priced LECs had ample opportunity to put forth evidence on a timely basis in the proceeding regarding the financial impact of a flash cut to bill-and-keep for non-access LEC-CMRS traffic. Instead, they waited until the issue was decided, and now seek to parry the new rule with skewed evidence,[10] submitted on a

[5] This figure is for traffic exchanged pursuant to current interconnection agreements.

[6] Of course, the relief sought by the High Priced LECs would reach all intraMTA traffic exchanged between CMRS carriers and LECs. Given the relatively small percentage of intraMTA traffic represented by the High Priced LECs, the Commission should be especially wary of recasting the rules for the remaining 95 percent of intraMTA traffic based on data for less than 5 percent of all intraMTA traffic.

[7] While the Commission could reconsider its rules on its own motion, it is highly unusual for it to do so based solely on information which was and/or could have been put in the record during the proceeding. The better course is to have the request put on public notice along with all other petitions for reconsideration. This would allow the Commission to engage in reasoned decision making by examining all requests for reconsideration, rather than handle them in a piecemeal fashion. This is particularly important given the significant number of trade-offs and compromises which were required in order to reach the comprehensive resolution presented by the *Order*.

[8] *Order* at para. 742, n. 1295.

[9] *Id.* at para. 738.

[10] Notably absent from the High Priced LEC submissions is any calculation of the immediate benefits they will receive from other aspects of the *Order*. For example, they fail to address the impact of the

confidential basis, outside of the normal reconsideration and review process. By filing previously withheld financial information under confidential seal, the High Priced LECs are effectively gaming the system in a manner that does not allow for a proper response. Rather than considering the confidential *ex partes* on a hurried basis after the fact, the Commission should treat the requests as petitions for reconsideration of the *Order*, and establish a proper notice and comment period that can be conducted by the Commission in an orderly, open and transparent fashion.

The High Priced LECs' request also is wrong from a substantive perspective. The High Priced LECs have offered no sufficient reason to abandon an immediate transition to a bill-and-keep regime for the exchange of intraMTA CMRS-LEC traffic. In effect, the High Priced LECs are seeking a stay of a key component of the *Order*, while at the same time requesting that the other benefits of the *Order* flow to them. A party requesting a stay faces a very heavy burden,[11] which the High Priced LECs have utterly failed to meet here. The Commission's ruling with respect to LEC-CMRS interconnection was based on specific findings by the Commission on the record evidence as a whole – which the High Priced LECs have failed to refute. For example, the Commission noted that although "it adopted a glide path to a bill-and-keep methodology for access charges generally and for reciprocal compensation between two wireline carriers, [it] found that a different approach [was] warranted for non-access traffic between LECs and CMRS carriers for <u>several reasons</u>."[12] First, the Commission found "a greater need for immediate application of a bill-and-keep methodology in [the non-access] context to address traffic stimulation."[13] The Commission correctly noted that the record demonstrates "a significant and growing problem of traffic stimulation and regulatory arbitrage in LEC-CMRS non-access traffic."[14] Indeed, MetroPCS repeatedly has demonstrated in its comments that traffic pumping is an escalating problem that has moved

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Commission decision to bring all VoIP-PSTN traffic within the 251(b)(5) framework – which brings an immediate benefit to LECs. They also benefit from the Commission's actions regarding phantom traffic and the prospect of receiving funds from the new Connect America Fund. *See* Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, *et al* (filed Dec. 19, 2011) ("CTIA Letter") at 2. Indeed, an orderly decisionmaking process mandates that the High Priced LECs explain the total impact of all puts and takes on their business prior to July 2012. The Commission should discount their claims when they selectively single out the revenues that they will be losing without taking into consideration the significant gains that they will receive.

[11] The standard for a stay before the Commission involves four criteria: "(1) the movants are likely to succeed on the merits on review; (2) the movants would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested parties; (4) a stay would serve the public interest. *See Review of Part 87 of the Commission's Rules Concerning Aviation Radio Service*, 26 FCC Rcd 685, 687, n.16 (2011); *see also Wireless E911 Location Accuracy Requirements*, 23 FCC Rcd 4011 (2008); *Petition by Forest Conservation Council, American Bird Conservancy and Friends of the Earth for National Environmental Policy Act Compliance*, 21 FCC Rcd 4462, ¶ 16 (2006).

[12] *Order* at para. 995 (emphasis added).

[13] *Id.*

[14] *Id.*

from simple arbitrage to wide-scale fraud. What started as a cottage industry where LECs with unjustifiably high rates encouraged customers of other carriers to call, has morphed into an enterprise where carriers and other parties are going to alarming lengths, such as using auto-dialers, to generate fraudulent high-cost traffic.[15] The Commission was correct to find that "addressing the traffic stimulation problem in reciprocal compensation is more urgent for LEC-CMRS traffic, and the bill-and-keep methodology we adopt today should eliminate the opportunity for parties to engage in such practices in connection with such traffic."[16] The High Priced LECs have not demonstrated anything that would dispute this Commission conclusion. Sadly, if the Commission extends the effective date, it will allow carriers to take advantage of the stay and exploit traffic pumping as much as possible over the next six month period. This is exactly the type of regulatory arbitrage that the Commission was determined to avoid.[17] It should not now reverse course and provide a clear path for regulatory arbitrage to continue unabated for an additional six month period.[18] In sum, the Commission's finding related to traffic pumping, in and of itself, is sufficient for the Commission to hold firm on its ruling that the exchange of non-access CMRS-LEC traffic should be subject to an immediate bill-and-keep regime.

The Commission also found that "an immediate transition for reciprocal compensation traffic exchanged between LECs and CMRS providers presents a far smaller risk of market disruption than would an immediate shift to a bill-and-keep methodology for intercarrier compensation more generally."[19] The Commission provides ample support for this conclusion. Notably, a significant number of carriers with which MetroPCS exchanges traffic do so without any agreement, and on a default bill-and-keep basis. The High Priced LECs have not explained why these carriers should now be permitted to seek interconnection arrangements on a different basis. In addition, while the High Priced LECs claim to speak for the wide variety of LECs (price cap and competitive LECs, or "CLECs"), many of the carriers with which MetroPCS exchanges traffic on a bill-and-keep basis are similarly situated to the High Priced LECs who are seeking relief but have raised no objection to the FCC action.

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[15] For example, MetroPCS recently shut down a traffic pumping operation where the high cost carrier was causing end users to purchase MetroPCS' services and place auto-dialer calls to numbers served by the high cost carrier.

[16] *Order* at para. 995.

[17] In other circumstances, the Commission has imposed freezes and other mechanisms to prevent parties from taking advantage of rule changes that are due to become effective at a future date. Here, if the Commission delays the effective date without anything more, it should expect there to be a flood of disputes and requests for interconnection from carriers who previously did not believe that an interconnection agreement was necessary. In many cases, these disputes and requests will seek rates which are far in excess of the bill-and-keep regime in an effort to milk the system for all possible gains prior to the rules becoming effective.

[18] This situation will be exacerbated since the Commission has reaffirmed that ILECs can force CMRS carriers into arbitrations. *Order* at para. 825. This allows ILECs an avenue to try to lock new agreements, with higher rates and without change in law provisions, into place.

[19] *Order* at para. 996.

For reciprocal compensation between CMRS providers and CLECs, the Commission properly notes that, until recently, it "had no pricing methodology applicable to competitive LEC-CMRS traffic, as reflected by the fact that the carriers in the recent North County Order had specifically asked the Commission to establish one for the first time."[20] Thus, since it was setting a methodology for the first time, the Commission found no reason it "should not require competitive LECs to meet that methodology immediately, particularly given that competitive LECs are not subject to rate regulation in the manner of incumbents, and therefore have the flexibility to adapt their businesses more quickly."[21] While certain CLECs now complain that they will be forced to abandon termination rates far in excess of $0.0007 per minute of use ("MOU"), they have failed to establish that these high rates are either justified or justifiable. The CLECs claim that they will be competitively harmed without a delay applying to them is likewise unavailing. The CLECs do not receive any recovery out of the access recovery mechanism ("ARM"), and thus there is no reason to delay the effective date with respect to them since there is no shortfall in their recovery. Indeed, the CLEC claims are more akin to a complaint that they do not receive recovery from the ARM, which the Commission should reject.

As for incumbent LECs ("ILECs"), the Commission stated that it was "confident the impact is not significant, particularly when balanced against the overall benefits. . ."[22] Indeed, the Commission found that "incumbent LECs and CMRS providers that fail to pursue an interconnection agreement do not receive any compensation for intraMTA traffic today."[23] Moreover, the Commission noted that "most large incumbent LECs have already adopted $0.0007 or less as their reciprocal compensation rate."[24] This is largely a result of the Commission's adoption of the "mirroring" rule, as set forth in the ISP Remand Order and upheld by the Court of Appeals for the District of Columbia Circuit.[25] While the High Priced LECs apparently proffer some confidential individual data regarding their specific billed intraMTA traffic, this limited sampling does not counteract the Commission's accurate conclusion that most ILECs have adopted $0.0007 or less as their reciprocal compensation rate.[26] The Commission

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[20] Id.

[21] Id.

[22] Id. at para. 997. (emphasis added).

[23] Id.

[24] Id.

[25] Id. at para. 784, n. 1447.

[26] Indeed, at least one of the price cap LECs who is a party to the Price Cap LEC Letter appears to terminate traffic at the $0.0007/MOU rate in at least one state. Further, as mentioned above, the price cap LECs who submitted the Price Cap LEC Letter represent less than 5% of all intraMTA traffic exchanged by MetroPCS with all LECs who have interconnection agreements with MetroPCS. Thus, the Commission does not have a sufficient record to stay the effectiveness of the Order with respect to the 95% of the CMRS-LEC traffic that the ex parte does not cover. Further, most (if not virtually all) traffic exchanged between CMRS carriers is also at a bill-and-keep rate. Accordingly, the Order properly addresses virtually all traffic that is exchanged by CMRS carriers with both other CMRS carriers and LECs.

certainly should not reverse course based on late-filed information that – even if taken at face value – does not serve to rebut the specific finding the Commission made. And, as noted by CTIA, "to the extent that any of the signatories . . . have agreements that reflect rates higher than $0.0007, it is likely because these companies were formed through consolidation out of smaller carriers that, in 2001, did not elect the $0.0007 rate."[27]

The simple fact is that all the High Priced LECs have managed to do is confirm that they have charged reciprocal compensation rates for CMRS-LEC traffic for the last ten years that are significantly above the industry norm – as specifically found by the Commission. Indeed, a core premise of the *Order* is that a "calling party carrier pays" system improperly incents carriers to maintain artificially high termination rates in order to shift costs to the originating carrier. So, not only does the showing made by the High Priced LECs fail to rebut the Commission finding that most incumbent LECs exchange traffic at $0.0007 or less, it also fails to create a compelling public interest justification for altering the *Order*.

With respect to rate-of-return carriers, the Commission found that "there is no allegation in the record that reforming LEC-CMRS reciprocal compensation obligations . . . . would have a harmful impact on [rate-of-return carriers]."[28] Moreover, the Commission granted a targeted benefit for such carriers, limiting their "responsibility for the costs of transport involving non-access traffic exchanged between CMRS providers and rural, rate-of-return regulated LECs."[29]

Further, the High Priced LECs argument that making the transition to bill-and-keep immediately would lead to additional arbitrage against them is simply wrong.[30] The Commission already has adopted phantom traffic protections to address this issue, and the High Priced LECs have not established the inadequacy of these measures. The phantom traffic rules require all carriers to identify the originator of the traffic.[31] This will allow the High Priced LECs to identify whether a CMRS carrier is involved. In addition, the Commission clarified that the only traffic that is subject to the CMRS-LEC bill-and-keep

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[27] CTIA Letter at 3. It is also interesting that CenturyLink would claim to be a midsized LEC given its recent purchase of Qwest Communications. Given that MetroPCS does not have access to the confidential data filed by CenturyLink, MetroPCS suggests that the Commission may want to explore further whether CenturyLink's information is based on its legacy markets, or rather on an amalgamation of all its markets, including the Qwest markets. While MetroPCS does not have operations in the former Qwest territories, MetroPCS would be surprised if Qwest was charging more than $0.0007/MOU for CMRS-LEC intraMTA traffic.

[28] *Order* at para. 997.

[29] *Id.* Moreover, the LECs as a whole were given substantial benefits in terms of the treatment of VoIP traffic, the identification of phantom traffic, and various support in the Connect America Fund.

[30] Price Cap LEC Letter at 3. And, regardless of whether the rule becomes effective in December or in July, the LECs will have the same incentive to route their traffic through CMRS carriers during either time period.

[31] *Order* at paras. 702-706.

regime is CMRS originated or terminated traffic.[32] Indeed, the Commission was explicit that any traffic that did not originate from or terminate on a CMRS network was not to be subject to the CMRS-LEC regime.[33] Thus, the High Priced LECs' claim that making the transition to bill-and-keep effective immediately will lead to arbitrage against them must be discounted.

The Commission also should reject the High Priced LECs' claims that a delay is appropriate since they believe that CMRS carriers will immediately begin crediting off all charges for intraLATA traffic.[34] In making this argument, the High Priced LECs unfairly presuppose that the CMRS carriers will violate the terms of their interconnection agreements. There is no record evidence of this and the Commission should ignore such unsubstantiated claims. Moreover, the Commission was clear that there is no "fresh look" and thus any changes to existing interconnection agreements would need to be via a change in law provision existing in an interconnection agreement. It is MetroPCS' experience that many change in law provisions in interconnection agreements require the parties to negotiate to amend the contract to take into account any changes in law. Thus, if CMRS carriers immediately short pay and do not follow their agreements, they would presumably be in breach of the contract and the LECs would have a remedy for such breach under the law. Furthermore, the High Priced LECs admit that the vast majority of interconnection agreements provide for a change in law,[35] so to the extent that such agreements provide for an immediate effect, the LECs cannot complain since such agreements were voluntarily negotiated. In effect, their complaint is that they should not have to live up to their agreements, which rings particularly hollow.[36]

Thus, for each type of LEC in the High Priced LEC category, the Commission considered the record evidence before it in this proceeding, and adopted a reasonable determination that an immediate transition to a bill-and-keep regime for the exchange of non-access LEC-CMRS traffic was appropriate. The High Priced LECs have not provided a sufficient basis for the Commission to alter its conclusion.

If the Commission Modifies the Effective Date of the Bill-and-Keep Regime for Non-Access CMRS-LEC Traffic, It Must Narrow the Relief as Much as Possible

If the Commission nonetheless considers a delay in the effective date of the transition to a bill-and-keep regime for the exchange of non-access CMRS-LEC traffic, it should carefully circumscribe the delay solely to specific circumstances. The scope of the relief sought by the High Priced LECs – the delay of bill-and-keep for all LEC-CMRS arrangements – clearly is overbroad. For instance, the Commission should not apply such an extension in the following situations: (1) where no agreement existed between the CMRS carrier and the LEC on the date that the Order was adopted (October 27, 2011); (2) where

[32] Id. at para. 1006.

[33] Id.

[34] Second Price Cap Letter at 1.

[35] Id.

[36] It has been MetroPCS' experience that when a rule change favors a LEC, they tend to insist that the change be given immediate effect.

CMRS-LEC traffic was being exchanged at a rate of $0.0007 or lower on October 27, 2011; (3) where the non-access traffic is exchanged between a CMRS provider and a CLEC; (4) where non-access traffic is exchanged between a CMRS provider and a rate-of-return ILEC; (5) where the price cap carrier is not a "mid-size company" as defined by Section 61.3 of the Commission's rules; and (6) where the traffic being exchanged, or the net revenues being paid, are *de minimis* between CMRS providers and LECs. In addition, MetroPCS strongly agrees with Sprint that the "Commission should direct carriers to automatically implement bill-and-keep – that is, to cease sending invoices – for this traffic on July 1, 2012."[37] Notably, such a change would relieve the implementation concerns expressed by some of the LECs regarding the burdens associated with renegotiating agreements pursuant to change of law provisions. Further, the Commission should clarify that no LEC can raise its non-access rate prior to any extended effective date. Finally, the Commission should reaffirm that any carrier whose traffic is not moved immediately to bill-and-keep will need to pay the CMRS carrier for all intraMTA traffic such LEC delivers to the CMRS carrier, even if it is delivered using an interexchange carrier.[38]

The High Priced LECs provide absolutely no rationale for extending the bill-and-keep effective date to situations in which no agreement existed between carriers when the *Order* was adopted (October 27, 2011). In such cases, the bill-and-keep effective date should remain at December 29, 2011. This should be a noncontroversial exception, as even CenturyLink, FairPoint, Frontier and Windstream concede that "situations where the mid-sized price cap carriers lack interconnection agreements cover only a small portion of CMRS-LEC intraMTA traffic today."[39] Since the *Order* clearly expresses the Commission's desire not to increase existing rates, and the Commission's ultimate commitment to a bill-and-keep regime, there is no reason to suspend the effective date of December 29, 2011 where bill-and-keep already exists. This carve-out would reduce game playing, traffic stimulation and arbitrage.

Second, the Commission should not postpone the bill-and-keep effective date in situations where carriers currently exchange non-access CMRS-LEC traffic at $0.0007 or lower. As noted above, the High Priced LECs allege that the Commission did not fully appreciate the number and scope of existing agreements that are at rates above $0.0007. While MetroPCS disputes this allegation, the fact remains that it provides absolutely no basis for deferring bill-and-keep for CMRS-LEC traffic that is already exchanged at a rate of $0.0007 or below. Indeed, the Commission's conclusion that "most large incumbent LECs have already adopted $0.0007 or less as their reciprocal compensation rate"[40] is one of the core reasons the Commission cites for the immediate transition to bill-and-keep. As a consequence,

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[37] Letter from Norina T. Moy, Sprint, to Ms. Marlene Dortch, Secretary, FCC, CC Docket No. 01-92, *et al* (filed Dec. 16, 2011).

[38] *Order* at para. 1006.

[39] Price Cap LEC Letter at 2. In MetroPCS' experience, most mid-size LECs do not have interconnection agreements – especially if the CMRS carrier does not have telephone numbers rated in the mid-size ILECs service area. Nonetheless, the Commission should not create a situation where ILECs have an incentive to engage in a "land rush" to lock in new agreements with high rates for as long as possible.

[40] *Order* at para. 997.

the effective date of December 29, 2011 should remain unchanged if the Commission makes any other modifications to the effective date for the exchange of non-access CMRS-LEC traffic.

Third, the Commission should not extend the bill-and-keep effective date for situations involving the exchange of non-access CMRS-CLEC Traffic. The Commission correctly found that there is no preexisting pricing methodology for CMRS-CLEC traffic. The Commission also specifically noted that an immediate transition to a bill-and-keep methodology for CMRS-CLEC traffic was appropriate, "particularly given that competitive LECs are not subject to rate regulation in the manner of incumbents, and therefore have the flexibility to adapt their businesses more quickly."[41] This conclusion is unrebutted by anything presented by CLECs Integra and tw telecom.[42] CLECs are not able to recover charges through the ARM, so there is no gap (as alleged by the price cap LECs) between the effective date of the transition and the recovery mechanism for CLECs (which does not exist). In effect, CLECs are trying to jump back on the gravy train without presenting any new facts or demonstrating any changed circumstances. In the meantime, delaying bill-and-keep for CMRS-CLEC traffic will increase the potential for CLECs to expand (or even begin) significant traffic pumping activities over the next six months. The Commission should not promote such activities, and should not allow an extension of the effective date for the exchange of CLEC-CMRS traffic to bill-and-keep. Further, unlike price cap LECs, CLECs generally have flexibility in the rates that they charge their end user customers. So, unlike the price cap LECs who need a recovery mechanism, CLECs can (and will) charge their customers for any lost revenue. Given that CLECs can charge their own customers, it makes no sense to continue to require CMRS carriers to pay such CLECs when they have a ready recovery mechanism already available to them.

The Commission also should not extend the bill-and-keep effective date to situations involving the exchange of non-access CMRS-rate-of-return LEC traffic. Once again, rate-of-return carriers were on notice that bill-and-keep was an immediate option for CMRS carriers, and had ample opportunity during the extending intercarrier compensation proceedings to put in competent record evidence of adverse impact. And yet, the Commission specifically found that "[f]or rate-of-return carriers, there is no allegation in the record that reforming LEC-CMRS reciprocal compensation obligations . . . . would have a harmful impact on them."[43] Moreover, the Commission granted rate-of-return carriers a further benefit by limiting their responsibility for the costs of transport involving non-access traffic exchanged between CMRS providers and rural, rate-of-return regulated LECs.[44] The Commission's adoption of an interim rule for the exchange of such traffic with respect to rate-of-return carriers (which is also subject to further comment) was specifically referenced by the Commission as "providing a measured transition" that would "help ensure no flash cuts for rate-of-return carriers."[45] The Commission also should resoundingly reject the continuing claims by the rate-of-return LECs – as advanced by NTCA – that they are incapable of abiding by the explicit Commission ruling that all intraMTA calls involving a CMRS carrier must be

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[41] Order at para. 996.

[42] CLEC Letter at 2.

[43] Order at para. 997.

[44] Id.

[45] Id. at para. 998.

handled on a bill-and-keep basis, regardless of whether the call is routed at some point over the facilities of an interexchange carrier. The *Order* did not alter existing law, but merely confirmed that the intraMTA rule is to be interpreted consistent with its plain meaning and the manner in which it has been interpreted by multiple federal appellate courts.[46] The Commission cannot condone the indefensible persistent efforts of rate-of-return carriers and some CLECs to convert local traffic into interexchange traffic in order to collect high access rates. Indeed, moving immediately to bill-and-keep will ameliorate some of the rating and routing issues mentioned by NTCA since all CMRS intraMTA calls will be bill-and-keep.

Furthermore, the Commission should not extend the bill-and-keep effective date for carriers that do not qualify as mid-sized companies under the Commission's rules.[47] These companies were major architects of the ABC Plan that was a major underpinning of the Commission's new regime, and they should not be heard to contend that CMRS-LEC traffic should not move immediately to bill-and-keep. Further, since the Commission's decision was based on the fact that most of the largest ILECs exchange traffic at $0.0007/MOU, it would not make sense to backtrack and allow a delayed effective date since the Commission's finding was explicitly based on facts relating to the ILECs specifically. In addition, limiting the relief to just mid-sized carriers would limit the impact of the delay to CMRS carriers and would limit the opportunities for gaming and arbitrage. In doing so, the Commission should clarify that the only traffic that would be subject to the delay would be traffic that originates or terminates to end users of the mid-sized companies. Otherwise, the exact arbitrage complained of by the High Priced LECs would be visited on the CMRS carriers.

The Commission also should not extend the bill-and-keep effective date in situations where the involved traffic or revenues is *de minimis* with respect to a particular CMRS carrier or as a whole in relation to its revenue. If the Commission does postpone the effective date, it should exclude situations in which the involved traffic or revenues between the parties do not reach a threshold of $25,000 per month**.** An immediate transition to bill-and-keep between carriers with inconsequential relationships would decrease the burdens on both CMRS carriers and LECs of having to deal with invoices and contracts that involve such small amounts of traffic and/or revenues. Further, the Commission should not extend the bill-and-keep effective date for mid-size price cap ILECs whose total CMRS-LEC intraMTA traffic is less than 1 percent of their total revenues. It makes no sense to have carriers whose revenues will not be substantially impacted by the change in rules to benefit from the delayed implementation if the effect is *de minimis* to their bottom line.[48] Indeed, the premise behind the High Priced LECs' argument is that the rule change

[46] *Id.* at para. 1007 and n. 2133.

[47] 47 C.F.R. § 61.3. MetroPCS also submits that, for purposes of any effective date extension, carriers that acquired the assets of a Bell Operating Company ("BOC") should not be considered a mid-sized company within the service areas acquired from the BOC.

[48] For example, the annualized revenue of the parties to the Price Cap Letter are as follows (based on their most recent 10-Q multiplied by 4): CenturyLink: $20 billion; Frontier Communications: approximately $5 billion; FairPoint Communications: approximately $1 billion; and Windstream Communications: approximately $4 billion. If the Commission applied a 1 percent revenue test, these carriers would have to have CMRS-LEC traffic exchange revenues in excess of $200 million, $50 million, $10 million, and $40 million respectively.

would be economically significant to them. To the extent that traffic exchanged from all CMRS carriers is de minimis it makes no sense to require the rules be delayed. This is especially the case since certain other rules, such as the phantom traffic rules and VoIP compensation rules, will become effective immediately (which presumably will not be de minimis to the mid-sized price ILEC's bottom line).

If the Commission does delay the bill-and-keep effective date for the exchange of non-access CMRS-LEC traffic until July 1, 2012, it should adopt a rule that directs carriers to implement bill-and-keep automatically as the relevant mechanism at that time – regardless of whether two carriers have an agreement in place or not, and regardless of the term of the agreement, or whether it has a change in law provision. Such a determination would ease the burden on both CMRS carriers and LECs of renegotiating agreements with each other for the exchange of this traffic. Furthermore, since the price cap carriers have placed into the record unsupported claims that most of their agreements contain change in law provisions that become effective upon the relevant change in law, such carriers should have no dispute about a bill-and-keep regime becoming effective immediately, despite any agreements to the contrary.[49] In addition, this concession completely undermines the earlier assertion of the price cap carriers that they will have a "significant implementation challenge" with respect to the transition to bill-and-keep.[50] Indeed, the price cap carriers now concede that "[t]he amount of time required to negotiate and execute amendments reflecting the change in law is largely irrelevant under these conditions."[51]

Notably, the Commission has taken similar steps to effect changes in existing contracts in the public interest in analogous circumstances. The Commission has not hesitated in the past to abrogate contract provisions that adversely affect competition or where end-user customers would be denied the benefits of a new Commission policy. For instance, in 1996, the Commission found that many ILECs had imposed arrangements on CMRS carriers that provided little or no reciprocal termination compensation for calls terminated on wireless networks.[52] To rectify the situation, the Commission concluded that "CMRS providers that are party to preexisting agreements with incumbent LECs that provide for non-mutual compensation have the option to renegotiate these agreements with no termination liabilities or other contract penalties."[53] A similar ruling entitling CMRS carriers to a bill-and-keep rate for the exchange of non-access CMRS-LEC traffic as of a certain date where an agreement exists at a different rate, would allow CMRS carriers and LECs to have the benefit of the transition to a bill-and-keep regime as quickly as possible – as the Commission originally intended – without a significant delay due to implementation concerns.

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[49] Second Price Cap Letter at 1.

[50] Price Cap LEC Letter at 3.

[51] Second Price Cap Letter at 1. This change in position in letters filed six days apart should call into question the accuracy of other assertions made by these carriers – particularly the confidential information they are basing their request on.

[52] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd 15499 at para. 1094 (Aug. 1, 1996).

[53] *Id.*

The Commission also should clarify that no LEC can raise its reciprocal compensation rate during any delay period. Since the Commission has confirmed that ILECs may cause CMRS carriers to undertake arbitrations with respect to interconnection agreements, the Commission should clarify that, during the period of any delay, a LEC may not raise its rates for interconnection above those that were in effect as of the effective date of the Order. Otherwise, carriers could game the system by trying to negotiate new agreements with no change in law provision so as to extend the current rates beyond the effective date of the Order.

Finally, the Commission should reiterate that any carrier whose traffic is not moved immediately to bill-and-keep will need to pay the CMRS carrier for all intraMTA traffic delivered to the CMRS carrier, even if it is delivered using an interexchange carrier. In MetroPCS' experience, some ILECs take the position that intraMTA traffic that is handed off to an interexchange carrier is not subject to reciprocal compensation. MetroPCS commends the Commission for recognizing this problem and confirming that all intraMTA traffic is subject to reciprocal compensation. What concerns MetroPCS is that many ILECs have not chosen to provide the CMRS carrier with the necessary information to bill for the traffic which is terminated by the ILECs on the CMRS carrier's network. If the Commission delays the effective date, the Commission must order those carriers who continue to bill at the current rates to provide the necessary information to the CMRS carriers to allow such carriers to bill the ILECs, and should allow the CMRS carriers to offset any amounts due to the CMRS carrier from the amounts due the ILEC. Otherwise, the ILECs may be able to game the system by refusing to provide the necessary information or refusing to pay their bills, while at the same time collecting for traffic terminated by the CMRS carriers.

Any questions regarding this notice should be directed to the undersigned.

Sincerely,

/s/ Carl W. Northrop

Carl Northrop
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